FOR ARGUMENT

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 5, Original

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF CALIFORNIA,
Defendant.

On the Report of the Special Master

REPLY BRIEF OF THE STATE OF CALIFORNIA

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INTRODUCTION

The United States, in its Brief in Opposition to California's Exception, depreciates the importance of the historical context of this controversy. U.S. Brief, p. 5, fn. 6. That context, especially with respect to the "particular interest" test advocated by the Special Master and the Government, cannot be ignored. It demonstrates that piers were historically the ports of southern California, and that, as circumstances require, recreational piers can be converted to commercial ports in a matter of days. (The Spe-

cial Master found that five of the sixteen piers which are the subject of the present controversy meet the definition of a port. Report, pp. 7 n. 7, 20-21.) Moreover that history underscores the fact that the sixteen piers meet the International Law Commission's criterion of "[p]ermanent structures erected on the coast and jutting out to sea. . . ." Lastly, the history of these piers demonstrates that, perhaps to a greater degree than other coastal installations which have been decreed to be parts of the coast, they create a "particular interest in the surrounding waters that would otherwise not exist . . . ." For these reasons, and the others which we have briefed, the sixteen piers constitute artificial extensions of California's coast line within the meaning of this Court's prior decrees in this case. *United States v. California*, 382 U.S. 448, 449 (1966); *United States v. California*, 432 U.S. 40, 41-42 (1977).

The young State of California, as we have shown, was blessed with a coast line along the Pacific Ocean of more than one thousand miles. In contrast with States on the Atlantic seaboard, however, California's coast line possessed few fully enclosed natural harbors.[1] In Southern California there was but one, San Diego Bay, at the extreme southern end of the State. As commerce developed, consequently, piers were built along the coast to serve as ports. In southern California, where fifteen of the sixteen piers in the present controversy are located, natural features such as offshore islands and submarine canyons provided a protection from the sea such that vessels could lay alongside piers 330 days a year. Piers such as the Santa

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[1]House of Representatives Report No. 2515, 82d Congress, 2d Session p. 19 (1952).

Monica also became popular for their restaurants, fishing and views.

Only later, well after the turn of the century, did artificial harbors appear on the California coast, formed by the building of rock breakwaters. The extensive Los Angeles-Long Beach Harbor in San Pedro Bay is the most notable example. While heavier shipping concentrated there, piers continued to serve as subsidiary ports between the principal facilities at San Diego, Los Angeles, and San Francisco, and other piers were used for recreation. *See* Exception of the State of California and Supporting Brief ("California Brief"), pp. 6-12.

Still later other kinds of coastal structures appeared on the California coast, structures called "jetties" and "groins." Built of closely driven pilings, or more frequently of piled boulders, these structures have diverse functions. Some have been built for purposes related to navigation or coast protection. Others exist for a variety of purposes unrelated to navigation or coast protection, such as providing power plants with an intake for cooling water.[2]

Of these breakwaters, jetties and groins, this Court has decreed all which affect the three-mile submerged-lands grant to California to constitute artificial extensions of California's coast. *United States v. California*, 432 U.S. 40 (1977).[3] The United States argues, however, that the sixteen piers ought not to be similarly treated. Among the principal arguments the Government raises in its Brief are these: (1) Those piers which the Special Master found

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[2]Tr. Denver Hearings, pp. 220-221, 233-234.

[3]Photographs of these structures are contained in the green binder, California Exh. GG.

to be ports are too modest to be treated in law as ports. (2) The fact that the piers are built of timber, concrete or steel pilings, rather than of rock, disentitles the piers to treatment as parts of the coast. (3) The use of piers as ports, or for fishing, dining and strolling, does not create an "interest in the surrounding waters that would otherwise not exist," such as is conceded to exist in the waters surrounding, for example, a rubble groin. (4) The piers should not be treated as parts of California's coast because they are akin to the causeway connecting the Florida Keys, which had it been treated as part of the coast would have created a 100-mile artificial extension of Florida into the sea. (None of the piers in controversy exceeds 3,500 feet in length.) (5) This Court may not consult the sound judgment found in nearly one hundred years of domestic admiralty jurisprudence, which holds firmly that piers are to be treated as extensions of the land and not as parts of the sea.

In reply to the matters raised by the Government, we wish to emphasize these points:

(1) The legislative history including the official Commentary to the Convention on the Territorial Sea and the Contiguous Zone shows that such structures as the sixteen California piers are parts of the coast for the purpose of measuring the territorial sea. T.I.A.S. 5639, 15 U.S.T. (Pt. 2) 1606 ("the Convention"). Article 8 of that Convention establishes two propositions. The first is that port facilities "shall be regarded as forming part of the coast." Historically, piers were the ports of Southern California, and the Special Master found that five of the piers in controversy meet the definition of a port. Report, pp. 7

n. 7, 20-21. The second proposition, as this Court has recognized, is that the Article "expressly covers artificial structures which are not closely linked to ports," so long as the structures are permanent, connected with the coast, and not of excessive length. *United States v. Louisiana*, 394 U.S. 11, 50 n. 64 (1969). Each of the piers meets the Convention's criteria.

(2) This case concerns the status of sixteen existing piers on California's coast. As the Special Master observed (Report, p. 26), neither California nor any other State can extend its submerged-lands ownership against the will of the Government by building new piers. The Army Corps of Engineers could refuse to allow construction of a pier, or as it has done in the past, condition its permission upon a waiver by the State of any claim of additional submerged land which would be generated by treating the new pier as part of the coast.[4]

(3) Employing the test adopted by the Special Master and the United States, the California piers unquestionably create a "particular interest in the surrounding waters that would otherwise not exist." In this respect perhaps the most telling episode in the historical context of this controversy occurred during World War II, when our armed forces occupied all of the piers on the California coast. Some were used as ports for the vessels patrolling the Pacific Coast; others were held under guard to prevent their use by enemy ships.[5]

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[4]California Exh. S; California Exh. P, document no. 50.

[5]Tr. Denver Hearings, pp. 303-304.

Article 8 of the Convention on the Territorial Sea and Contiguous Zone specifically addresses the status of coastal structures extending into the sea. For that reason we treat first the Government's arguments in respect of Article 8. We next address its remarks respecting Article 3 of the Convention, and then its other points.

ARGUMENT

I

ARTICLE 8 OF THE CONVENTION ESTABLISHES THAT THE SIXTEEN PIERS "SHALL BE REGARDED AS FORMING PART OF THE COAST."

A. The Text of Article 8 Specifically Treats Port Facilities as Parts of the Coast.

In 1966 this Court decreed, "The coast line is to be taken as heretofore or hereafter modified by natural or artificial means, and includes the outermost permanent harbor works that form an integral part of the harbor system *within the meaning of* Article 8 of the Convention on the Territorial Sea and the Contiguous Zone . . . ." *United States v. California*, 382 U.S. 448, 449. (Emphasis added.) The English text of Article 8 provides:

> "For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast."

As we have stressed (California Brief, pp. 27-28) and reiterate below, the French text of the Convention is equally authoritative with the English. When the two are read together it is seen that Article 8 focuses primarily on ports. Nevertheless the United States in its Brief em-

phasizes the concept "harbor" virtually to the exclusion of considering whether the piers or any of them constitute ports. U.S. Brief, pp. 13-18. It dissects the English version of the article and argues that the piers are not "harbor works," that they are not "harbors," and that they are not part of a "harbor system." *Id.*

Certainly they are not harbors; a harbor is a body of water, not a structure. Nor are the piers "harbor works" according to the definitions produced by the United States, all of which define a breakwater; yet it is certain that various structures other than breakwaters constitute harbor works within the meaning of Article 8. See *United States v. California*, 432 U.S. 40, 41-42 (1977). The fifteen piers which are located in southern California are, however, parts of a harbor system in the fact that they lie within the natural protection afforded by that coast.[6] But for thirty or so days a year, when storms arrive from the southeast, these piers have no need of sheltering features other than what nature has provided.[7] Even were these piers not located within this natural harbor system, however, it is clear they are "harbor works" within the meaning of Article 8.

A port, as the Special Master found and as the parties agree, "is any place where passengers or cargo may be transferred between ship and shore. A port may or may not be part of a harbor, which is a haven providing safe

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[6]The sixteenth pier, Sharpe Beach, is located just south of San Francisco. It does not enjoy the natural protection of the southern California piers.

[7]*See* Exception of the State of California and Supporting Brief ("California Brief"), p. 12.

anchorage and sheltering for boats from weather conditions prevailing on the open sea." Report of the Special Master, p. 7 n. 7. Implicit in the Government's argument respecting the text of Article 8 is the suggestion that the term "harbor works" applies strictly to works associated with a harbor, and not to port facilities unconnected with a harbor. Yet plainly the International Law Commission did not make the distinction between a port and a harbor which was noted by the Special Master. Report, p. 7 n. 7. The Commission titled Article 8 (in both French and English) "Ports." Moreover, the French text of the article, which is equally authoritative with the English and which must be read together with the English to fully ascertain the meaning of the article, speaks not of "harbor works" but of the "permanent installations" of a "port system." Too, the first paragraph of the ILC's official Commentary to Article 8 specifies the rule for enclosing the inland waters of a "port" (*see* note 11, *infra*). This point is expounded in more detail in our opening Brief at pages 27-28.

The Special Master found that five of the piers meet the definition of a port. These are the Rincon-Punta Gorda, Carpinteria, Ellwood, Morro Strand and Port Orford piers. Report of the Special Master, pp. 7 n. 7, 20-21. These piers then, being "permanent installations" of a "port system," are "harbor works" within the meaning of Article 8.

The United States then asserts, however, that the Special Master found that the transfer of cargo and passengers at these piers is *"de minimis,"* and that the Master "concluded that the amount of shipping handled by these facilities does not justify deeming them 'ports.'" U.S. Brief,

pp. 26-27. First, the Special Master did not conclude that the amount of shipping handled by these piers was not sufficient to deem them "ports"; he plainly considered them ports. Report, pp. 7 n. 7, 20-21. His recommendation was that the amount of shipping handled was insufficient to consider them as structures *assimilated* to harbor works pursuant to the official Commentary to Article 8. Report, p. 29.[8] As to the suggestion that a port must handle a certain volume of shipping before it is deemed in law a port, "It suffices to say that the Convention contains no such criteri[on]." *United States v. Louisiana,* 394 U.S. 11, 41 fn. 48 (1969).

In any event, there is no evidentiary basis for the Special Master's statement. The issue in this respect before the Master was whether the piers or any of them are or are not ports, not whether they are extensive ports or modest ports. No evidence of the volume of shipping handled by these five piers was offered by either party. Since the Government has seized on this remark of the Special Master, however, it may be worth noting that where figures are readily available, the volume of shipping can be surprisingly large.[9]

The United States agrees that the Port Orford Pier is a port facility "at least to the extent it has a coin-operated

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[8]The Government's remarks with respect to that Commentary are treated in sub-part I B, below.

[9]The Corps of Engineers, for example, reports that 4.4 million tons of cargo was transferred at Morro Strand Pier (listed under Estero Bay) in 1973. By contrast, the fully enclosed waters of the adjacent Morro Bay harbor (see *United States v. California,* 432 U.S. 40, 41, para. 2a) handled but 2,799 tons. Waterborne Commerce Statistics, U.S. Army Corps of Engineers (1973), p. 9. See Tr. Denver Hearings, p. 205, lines 12-15.

davit suitable for lowering small boats into the water." U.S. Brief, p. 26. This facility, it should be noted, is also equipped with a water-level landing (see California Exh. I) and three massive dolphins on its lee side for berthing larger vessels, today primarily oil-company ships. Tr. Denver Hearings, p. 300. These features were observed by counsel and the Special Master during an onsite inspection in November, 1978.[10]

B. The Commentary of the ILC, as this Court Has Recognized, Shows that Article 8 "Expressly Covers Artificial Structures Which Are Not Closely Linked to Ports," if They Are Permanent and Connected with the Coast.

The second paragraph of the ILC's official Commentary to Article 8 reads:

> "Permanent structures erected on the coast and jutting out to sea (such as jetties and coast protective works) are assimilated to harbour works."[11]

Citing to this paragraph of the Commentary, this Court has held that Article 8 "expressly covers artificial structures which are not closely linked to ports." *United States v.*

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[10]A vessel is seen leaving the Carpinteria Pier in the aerial photograph of that pier contained in California Exhibit I, and other vessels are shown using the pier in the photograph in California Exhibit GG, under "Miscellaneous Piers." Pictures of the off-loading facilitites of the Ellwood, Rincon, and Port Orford piers are also included in this section of Exhibit GG. Tr. Denver Hearings, pp. 222-224.

[11]Report of the International Law Commission to the General Assembly, 11 U.N. GAOR, Supp. (No. 9), U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 270, U.N. Doc. A/CN.4/SER.A/1956/Add. 1. The passage quoted by the United States at page 20 of its brief was not the language of the ILC Commentary to the final draft of Article 8, but rather of a "comment" to the 1954 draft of the article.

Louisiana, 394 U.S. 11, 50 n. 64 (1969). We hold that this paragraph means precisely what it says, and that the sixteen piers, being "permanent structures erected on the coast and jutting out to sea," are "assimilated" to harbor works, and thus to be regarded as forming part of the coast.[12] The United States disagrees, making several comments about this paragraph, and then suggesting a construction of it which it asserts would preclude the treatment of piers as parts of the coast. U.S. Brief, pp. 20-27.

First, it asserts that Article 8 of the Convention "did not break new ground, but merely codified . . ." a principle adopted in 1930 by the League of Nations Conference, which concerned ports as such.[13] It might be accurate to state this of the text of the article, were there not the ILC's Commentary and the extensive preparatory work. Certainly, the mandate of Article 8 that port facilities be treated as part of the coast falls into the category of "codification" of existing principles; nations had histori-

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[12]The Special Master specifically found that all of the piers are "permanent" facilities. Report, p. 27 n. 21.

[13]We take emphatic issue with the remarks in footnote 17, page 22 of the United States' Brief, respecting Judge Jessup's renderings of certain French texts in the ILC records and elsewhere. No evidence whatever was offered to contradict Judge Jessup's testimony. His fluency in the French language, including analysis of the French texts of opinions of the International Court of Justice, was thoroughly established. In addition, passages from the standard *Robert's French Dictionary* were introduced to corroborate his translations. Tr. N.Y. Hearings, pp. 138-143, 260-262; California Exhs. D and E. Moreover, accounts of the ILC discussions in both French and English were introduced, showing that the English word "pier" was invariably rendered "*jetée*" in French. California Exhibit D, Tr. N.Y. Hearings, pp. 138-142. Lastly, of course, the Special Master took issue with the United States, finding that the French "*jetée*" means "pier" as well as "jetty." Report, p. 27.

cally considered their port works as parts of their coasts. On the other hand, the principle that permanent coastal installations, even if not connected with a port or a harbor, likewise be treated as parts of the coast if they are not excessively long, may fall within the ILC's category of "progressive development" of international law.[14] The status of such less-prevalent structures was clearly of secondary importance to the status of port facilities; the drafters of the Convention, however, no less clearly provided that such structures were to be treated as parts of the coast, the same as port facilities.

The United States asserts that "[t[he references invoked [by California] are too equivocal to support" the conclusion that the Commentary assimilates permanent structures erected on the coast to "harbour works," U.S. Brief, p. 24.

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[14]The statute of the International Law Commission (General Assembly Resolution 174 (II), November 21, 1947), charges the Commission with the codification *and* "progressive development" of international law. In its report to the General Assembly respecting the final draft of the Convention, the Commission observed:

> "In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, *the distinction established in the statute between these two activities can hardly be maintained.* Not only may there be wide differences of opinion as to whether a subject is already 'sufficiently developed in practice', but also several of the provisions adopted by the Commission, based on a 'recognized principle of international law', have been framed in such a way as to place them in the 'progressive development' category. Although it tried at first to specify which articles fell into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either."

Report of the International Law Commission to the General Assembly, U.N. Doc. A/3159, *supra* note 11, para. 26, [1956] 2 Y.B. Int'l L. Comm'n 255-256. (Emphasis added.)

The references are not at all equivocal. The Commission members in 1954, 1955 and 1956 discussed lighthouses, jetties (which are often unconnected with a port or harbor), protecting dikes, and structures used for the purpose of harnessing tidal energy. Moreover, there was extensive discussion of a seven-mile-long pier in the Persian Gulf, which the Government concedes was apparently unassociated with a harbor. U.S. Brief, p. 23. The product of these discussions was the paragraph of the Commentary in question, which "assimilates" such coastal structures to harbor works. Significantly, the first draft of this paragraph read:

> "Permanent structures erected on the coast and jutting out to sea (such as jetties and protecting walls or dykes) *are deemed to be harbour works.*"[15] (Emphasis added.)

To make clear that the paragraph referred to coastal installations not necessarily related to a port or harbor, the words "are deemed to be" were changed to "are assimilated to" in the official draft.[16] These references could have been made less "equivocal," we submit, only had the Commission specifically discussed the California piers.[17]

Next, the Government asserts that if the Commentary were read at face value, it would have amounted to a "radi-

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[15]Draft Report of the International Law Commission Covering the Work of its 6th Session, Chapter IV, Regime of the Territorial Sea, U.N. Doc. A/CN.4/L.48/Add.4 (1954).

[16]Report of the International Law Commission to the General Assembly, 9 U.N. GAOR, Supp. (No. 9), U.N. Doc. A/2693 (1954), reprinted in [1954] 2 Y.B. Int'l L. Comm'n 155, U.N. Doc.A/CN. 4/SER.A/1954/Add. 1.

[17]Footnote 18 on page 24 of the United States' Brief is perplexing. All of the "legislative deliberations" cited by California—the discussions of the ILC—occurred prior to the adoption of the Convention at the Geneva Conference in 1958.

cal change of view by the Commission," a "wholly new rule." U.S. Brief, pp. 23, 24. The United States is overstating the matter. It is entirely natural that the Commission "assimilated" to harbor works "permanent structures erected on the coast and jutting out to sea," even when not associated with a port or harbor, rather than treating the subject in a separate article. Sir Gerald Fitzmaurice expressed the rationale of the ILC best:

> ". . . *The Commission's rule that jetties and piers be treated as part of the coastline had been based on the assumption that those installations would be of such a type as to constitute a physical part of such coastline*; it would indeed have been inconvenient to treat that kind of installation otherwise than in the manner advocated by the Commission. But huge piers of the type being constructed in the Persian Gulf [*i.e.*, the seven-mile pier, ought to be treated differently]." (Emphasis added.)[18]

(It was this latter concern with overly long structures which led to the third paragraph of the ILC's Commentary to Article 8, expressing caution against the use as base-points of structuress several kilometers in length. The length of the longest pier in issue is but 3500 feet. Report, p. 21.)

Too, it may be recalled that a separate article for non-port-related structures was once suggested, but that the

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[18]Summary Records of the 7th Session, [1955] 1 Y.B. Int'l L. Comm'n 73, U.N. Doc. A/CN.4/SER. A/1955. The italicized portion of this passage was quoted in *United States v. Louisiana, supra,* 394 U.S. at 37 n. 42.

Commission elected to treat the matter in the form of the Commentary to Article 8.[19]

The Government's suggested construction of the Commentary is then given on page 25 of its Brief:[20]

> "The location of the Comment under Article 8 can be explained as indicating the Commission's view that the coastline is affected by artificial structures jutting out to sea (as opposed to artificial landfill) only when they perform a function comparable to harbor works—such as protecting or sheltering the shore." U.S. Brief, p. 25.

But the very language of the Commentary belies the Government's suggestion. Had the Commission intended what the Government suggests, it would have written something to this effect: "Protecting or sheltering structures *only* are assimilated to harbor works." But it did not. It provided that "[p]ermanent structures erected on the coast and jutting out to sea . . . are *assimilated* to harbour works." And it gave two examples of what it meant, structures "*such as* jetties and coast protective works." Had the Commission intended the rule to be *limited* to jetties and coast protective works, "it would have done so by choice of apt words to express that intent. It did not do so. . . ." *United States v. Lexington Mill & E. Co.*, 232 U.S. 399, 410 (1914).

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[19]Summary Records of the 6th Session, [1954] 1 Y.B. Int'l L. Comm'n 88, U.N. Doc. A/CN. 4/SER. A/1954.

[20]The United States throughout its Brief incorrectly refers to the Commentary as a "Comment." "Commentary" is the appropriate term for the Commission's official remarks on the final draft of the Convention as reported to the General Assembly. The term "Comment" is used to describe such remarks accompanying earlier, working drafts of the Convention. *See* Jessup Memorandum, California Exh. C, p. 43.

II

ARTICLE 3 SIMILARLY ESTABLISHES THAT THE SIXTEEN PIERS, CONSTITUTING PORTIONS OF THE CHARTED LOW-WATER LINE, ARE PARTS OF THE COAST FOR PURPOSES OF THE SUBMERGED LANDS ACT.

While Article 8 specifically addresses the question of coastal structures jutting into the sea, Article 3, which states the rule of the "normal baseline," corroborates the conclusion that the sixteen piers are to be treated as parts of the coast. The United States presents its arguments with respect to Article 3 in sections II and VI of its Brief. U.S. Brief, pp. 11-13 and 30-33. We address the points made in both those sections of the Government's brief here.

Article 3 provides,

> "Except as otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast *as marked on large-scale charts officially recognized by the coastal State.*" (Emphasis added.)

The United States takes issue with California by asserting that the piers are not depicted as segments of the low-water line on the Government's official charts. U.S. Brief, p. 30. It acknowledges that the piers are depicted by a thin black line (an extension of the line used for all other segments of the low-water line), but asserts that this fact is insufficient to treat the piers as parts of the normal baseline within the meaning of Article 3. Several observations are pertinent.

The United States urges that piers must be connected with a harbor or constitute "coast protective works" to qualify as parts of the coast, notwithstanding that this Court has decreed as parts of the coast a number of structures, including certain jetties, having neither attribute. *United States v. California*, 432 U.S. 40 (1977); *see* note 2, *supra*. Not acknowledging that such structures are assimilated to harborworks by the terms of the Commentary to Article 8, the Government suggests instead that Article 3 "presumably was the premise" of the 1977 decree. U.S. Brief, pp. 11-12.[21] If Article 3 is in fact the basis for treating these structures as parts of the coast, it is for only one reason: they are shown as parts of "the low-water line as marked on large-scale charts officially recognized by" the United States. But as the Government concedes, the piers are shown in the identical manner.[22] If the structures referred to are parts of the coast by virtue of Article 3 then, the piers are similarly parts of the coast. If it is Article 8 that treats these jetties which serve no harbor or coast-protective function as parts of the coast, it is because they are "permanent structures erected on the coast and jutting out to sea." The piers, meeting the same criterion, must be similarly treated. But the Government cannot fight both articles. Its position "deserves the ironic tribute . . . that it works for the United States pre-

[21] Moreover, two of its witnesses testified that jetties and groins are to be treated as parts of the coast by virtue of Article 3. Deposition of Robert D. Hodgson, Defendant's Exh. U-1, p. 131, lines 1-4; testimony of Elihu Lauterpacht, Tr. N.Y. Hearings, pp. 186-187.

[22] In fact, Dr. Hodgson testified that this identical manner of depiction accounted at least in one instance for the fact that the United States has used piers as basepoints on the charts that depict its claim of territorial sea. The draftsman, he testified, assumed the pier was a jetty or breakwater. Tr. Denver Hearings, pp. 389-395.

cisely as the old game of 'heads I win, tails you lose.'" *Texas Boundary Case*, 394 U.S. 1, 9 (1969) (Black, J., dissenting).

The United States elsewhere argues that "the absence of a low-water line critically distinguishes piers [from other coastal installations] and irrevocably excludes them from consideration under Article 3." U.S. Brief, p. 12. The touchstone of Article 3 of course is not "a low-water line," but rather "the low-water line as marked on large-scale charts officially recognized by the coastal State." On the Government's charts, as we have shown, this line follows the outline of the piers into the sea. But in any event, a pier does have a low-water line—that height on its substructure reached by the sea at low water. What the Government is in fact arguing, as it did before the Special Master (Report, p. 24), is that a pier lacks a "continuous low-water line." The argument is that because a pier is a pile-supported structure, there are "gaps" in the low-water line between one piling and the next. This fact of being built upon pilings, continues the argument, disqualifies the piers from treatment as parts of the coast.[23] Again we would note, "It suffices to say that the Convention contains no such "criteri[on]." *United States v. Louisiana*, 394 U.S. 11, 41 n. 48. The remarks of the Maryland Court of Appeal, quoting from the early American case, *The Haxby*, 94 Fed. 1016 (E.D. Pa. 1899), are appropriate:

> "'The Century Dictionary defines a pier to be "a projecting quay, wharf or other landing place"; and, without some qualifying adjective, this is the ordinary

[23] A "continuous" low-water line could be effected simply by nailing planks from piling to piling at the elevation of low water.

> meaning of the word. It may be a solid stone structure, or an outer shell of stone or wood filled in with earth; or it may be a framework formed by fastening a platform of planks upon piles driven into the soil at the bottom of the water. In either event, it is a projection of the land, and for purposes of jurisdiction it should be so treated'. . . . The mere fact that these piers are built upon piles, instead of on solid ground, ought not to make any difference. They are permanent structures, and as effectively monopolize the use of the land under them as if they were built in one of the other ways mentioned in *The Haxby*." *Western Maryland T.R. Co. v. Mayor, etc. of Baltimore*, 68 Atl. 6, 10 (Md. App. 1907).

The Second Circuit has noted too:

> "A wharf or pier is usually built on pilings over what *was* navigable water. When the structure is completed, the water over which it is built is *permanently* removed from navigation as if the structure had been in the first instance built on land." *Michigan Mutual Liability Co. v. Arrien*, 344 F.2d 640, 644 (2d Cir. 1965) (emphasis in original).

The Special Master rejected the United States' argument about the "continuous" low-water line, recognizing that this mode of construction is immaterial. For one, he noted that structures the United States calls "solid" (U.S. Brief, p. 12), such as the Long Beach breakwater, are as much as forty-five per cent water, and in this respect also lack a "continuous low-water line." Report, p. 24. Too, portions of the Zuniga jetty at San Diego are submerged, thus creating "discontinuities" in the low-water line, yet this Court has

decreed that the jetty is an artificial extension of the coast. Report, pp. 17-18; *United States v. California,* 432 U.S. 40, 41-42.

In any event, sea caves, overhanging cliffs, and the imprecision of hydrographic surveying render the notion of a truly "continuous" low-water line a myth. Testimony of William J. Herron, Tr. Denver Hearings, pp. 225-226, 271-276, 361-362. Mr. Shalowitz also provides a good exposition of the approximate and "discontinuous" nature of the low-water line. II Shalowitz, Shore and Sea Boundaries (1964), pp. 183-184, 187.

III

THE CALIFORNIA PIERS ARE VASTLY DISSIMILAR FROM THE 100-MILE-LONG OVERSEAS HIGHWAY IN FLORIDA. THE DECREE IN UNITED STATES V. FLORIDA IS HENCE INAPPOSITE.

The United States argues that treating the sixteen piers as parts of California's coast line for purposes of the Submerged Lands Act is inconsistent with this Court's decree in *United States v. Florida,* 425 U.S. 791 (1976). U.S. Brief, pp. 27-30. The argument is unsound.

In the Florida Submerged Lands Act litigation the question arose whether Florida Bay (see United States' Exhibit 23) constituted either an "historical" or "judicial" bay. (For the distinction between the two, see generally *United States v. California,* 381 U.S. 139, 172-175 (1965).) Florida Bay is bounded on the south by a series of keys connected by a causeway constituting the "Overseas Highway," U.S. Highway 1. The question was heard by Special Master Albert

B. Maris, whose report dated January 18, 1974, was excepted to by both the United States and Florida. The Court overruled Florida's exception to the recommendation that the Bay not be ruled an "historic" bay. But it referred back to the Special Master his recommendation that certain portions of the bay be recognized as a juridical bay. *United States v. Florida,* 420 U.S. 531, 533 (1975). Thereafter the parties stipulated that no inland waters exist within Florida Bay, and the Special Master in his second report dated December 30, 1975, recommended that the stipulation be approved. The parties then moved jointly for the entry of a decree approving the stipulation and the motion was granted. *United States v. Florida,* 425 U.S. 791, 793 (1976).

Thus, asserts the United States, the Court has ruled the Overseas Highway causeway not to constitute an "artificial extension of the coast." And, runs the argument, since the California piers are of open-pile construction, as is the causeway (see United States' Exhibit 14), the piers should not be regarded as artificial extensions of the coast. U.S. Brief, p. 30. The dissimilarities between the Florida causeway and the California piers, however, undo the parallel drawn by the United States.

As Judge Jessup noted upon cross-examination by Mr. Ryan, if the causeway were treated as a structure "assimilated" to Article 8 harborworks, it would effect a 100-mile artificial extension of the coast. Tr. N.Y. Hearings, pp. 104-105. Such an extension would, he observed, contravene the intent of the third paragraph of the official Commentary to Article 8. (*See* text following Note 18, *supra.*) That paragraph cautions against using as basepoints structures of

excessive length, and as Judge Jessup stated, was based upon discussion of a seven-mile-long pier in the Persian Gulf.

Another distinguishing feature is the fact that the causeway is designed to admit navigation through it at many points. Dr. Hodgson, testifying for the Government, pointed out numerous navigational channels through the causeway, circling them in red on Plaintiff's Exhibit 23. The piers on the other hand, are "built on pilings over what was navigable water. When the structure is completed, the water over which it is built is permanently removed from navigation as if the structure had been in the first instance built on land." *Michigan Mutual Liability Co. v. Arrien, supra,* 344 F.2d 640, 644 (2d Cir. 1965). As the Special Master observed, the piers do not admit of navigation beneath their decks. Report, p. 21.

What the Government argued in *Florida* emphasizes this dissimilarity between the causeway and the piers:

> "The islands west of Knight Key cannot be considered part of the mainland . . . . As the State concedes (Br. 58), the most seaward of those islands, Key West, is over 100 highway miles from the mainland; and a water gap of more than 5 miles separates Bahia Key, the easternmost of the lower Keys, from Knight Key, the westernmost of the upper Keys. *These distances are far too great to permit the lower Florida Keys to be realistically considered part of the mainland. . . . Similarly, the water channels west of Knight Key* [through the causeway], although not deep enough to accommodate truly large vessels, *are nevertheless navigable by ocean-going fishing vessels; those channels therefore are of sufficient international*

> *significance to foreclose treatment of outlying islands as part of the mainland.*" Brief of the United States in Response to Defendant's Brief in Support of Its Exceptions to the Report of the Special Master, *United States v. Florida,* No. 52, Original, August, 1974, pp. 27-28. (Emphasis added.)

Several other points may be mentioned. While the International Law Commission on a number of occasions mentioned piers in its discussions of what became Article 8, one finds no mention of bridges or causeways. Secondly, the phrase contained in the second paragraph of the Commentary, "[p]ermanent structures erected on the coast and jutting out to sea," aptly describes the California piers; it does not, however, describe a series of bridges connecting a string of offshore islands. Tr. Denver Hearings, pp. 368-369. Thirdly, Congress has seen fit to draw a significant distinction between piers on the one hand and causeways or bridges on the other. By the Rivers and Harbors Act of 1899 it delegated to the Secretary of the Army through the Corps of Engineers the authority to permit construction of jetties, breakwaters, wharves and piers. 33 U.S.C. § 403. But it reserved to itself the power to approve construction of causeways. 33 U.S.C. § 401.[24]

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[24]The Rincon-Punta Gorda complex is truly, in the contemplation of engineering and the law, a "pier" and not a causeway; otherwise the Corps of Engineers could not have issued a permit for its construction. Tr. Denver Hearings, pp. 309-310, 330-331; *see also* Tr. Denver Hearings, p. 389, line 7 (testimony of Robert D. Hodgson). This construction by the Corps of the Act's application to the Rincon Pier is significant in determining whether "pier" or "causeway" more properly characterizes the structure. *Wisconsin v. Illinois,* 278 U.S. 367, 413 (1929).

IV

AMERICAN CASES, WHICH WITHOUT EXCEPTION TREAT PIERS AS EXTENSIONS OF THE COAST, SHOW THERE IS NOTHING ABERRANT IN THE ILC'S RULE. MOREOVER, SINCE CONGRESS CONTEMPLATED THAT DOMESTIC LAW WOULD CONTROL CONSTRUCTION OF THE SUBMERGED LANDS ACT, THERE IS NO CAUSE FOR THIS COURT TO SHUN THESE DECISIONS.

In American law, "[f]rom time immemorial piers, docks, wharves and other like structures, which are firmly attached to the land and extend over navigable waters, have been deemed to be extensions of the land . . ." *East v. Oosting*, 245 F.Supp. 51, 53-54 (E.D. Va. 1965). In its Brief, at pages 38-40, the United States mischaracterizes California's citation to the unbroken line of domestic admiralty cases holding that piers are extensions of the land. *See* California Brief, pp. 41-42. We recognize that the Convention has been adopted to provide definitions for the Submerged Lands Act; otherwise we would not stress the fact that Articles 3 and 8 of the Convention treat the sixteen piers as forming parts of the coast. But the American cases are useful to show there is nothing strange or esoteric in what one ILC member called "[t]he Commission's rule that jetties and piers be treated as part of the coastline . . . ."[25] (This remark was quoted by this Court

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[25]See note 18, *supra*, and accompanying text. *P.C. Pfeiffer Co., Inc. v. Ford*, ... U.S. ...., 100 S.Ct. 328 (1979), does not affect this Court's rule that piers are extensions of the land. *See Nacirema Co. v. Johnson*, 396 U.S. 212 (1969). *Pfeiffer* merely reflects the fact that Congress has extended the coverage for injuries to longshoremen and harbor workers. Formerly the worker was covered only if the injury occurred on navigable waters; he is presently covered even if the injury occurs on certain land facilities "adjoining" navigable waters, e.g., piers. *Id.* at 332-333.

in *United States v. Louisiana*, 394 U.S. at 37 n. 42.)

Moreover, as we have shown, Congress plainly contemplated that questions of construction of the Submerged Lands Act would be controlled not by international law but by domestic law. California Brief, pp. 38-41. It might be added that seven years later, when the Convention was before the Senate for its advice and consent, Government witnesses again stressed that nothing in those principles of international law would prejudice the rights of the States under the Submerged Lands Act.[26] In this light, we see no reason that this Court must ignore the teachings of our domestic jurisprudence.

V

EVEN IF THIS COURT WERE TO EMPLOY THE TEST ADOPTED BY THE SPECIAL MASTER AND THE UNITED STATES, THE PIERS UNQUESTIONABLY CREATE AN "INTEREST IN THE SURROUNDING WATERS THAT WOULD OTHERWISE NOT EXIST."

The Special Master recommended that the status of the sixteen piers as parts of the coast be determined by applying the "particular interest" test suggested by authors McDougal and Burke, The Public Order of the Oceans (1962), pp. 387-88. Report, pp. 26-27. The United States also urges adoption of this test. U.S. Brief, pp. 33-37. We stress again that the criterion of the Convention is unam-

[26] Hearing before the Committee on Foreign Relations, United States Senate, on Executives J, K, L, M, and N, 86th Congress, 2d Session (1960), pp. 19-20.

biguous: "[p]ermanent structures erected on the coast and jutting out to sea . . . ." Of the appropriateness of the McDougal and Burke test, therefore, it should suffice once again to note that "the Convention contains no such criteria." *United States v. Louisiana,* 394 U.S. at 41 fn. 48. We shall reply, nevertheless, to the remarks made by the Government.

The United States, it should first be mentioned, ignores the fact that the "interest" test was formulated by its authors not to determine the status of structures erected on the coast, such as piers, but to determine whether artificial islands unconnected with the coast ought to be used for delimiting the territorial sea. McDougal and Burke, pp. 387-88. Contrary to the Government's assertion (U.S. Brief, p. 35), the test is plainly a departure from principles of international law, for Article 10 of the Convention prohibits the use of artificial islands as basepoints.[27]

Second, the Special Master and the United States cite only the "policy issue" suggested by the authors, but not the authors' "*chief* criterion":

> "The chief criterion for appraising the reasonableness of a claim to delimit the territorial sea, or of an area of internal waters, from an artificially formed area of land surrounded by water, is whether it is constructed for practical use or rather only as a dis-

[27]The United States is correct (U.S. Brief, pp. 34-35) that California had called to the attention of the Special Master the passage in question. Both parties in fact made reference to the work of McDougal and Burke in their review of the literature. *See,* e.g., United States Exhibit 12, p. 35. Neither the Special Master, however, nor either of the parties noticed that the authors' suggested criterion was designed not for application to structures erected on the coast, but to artificial islands offshore. We regret the oversight.

> guised attempt to extend the territorial sea or internal waters without other relation to local interest." McDougal and Burke, pp. 387-88.

None of the piers in issue was built as a "disguised attempt to extend the territorial sea," or the lands confirmed in California by the Submerged Lands Act. All were built for "practical use": for ports, for energy production, for fishing, and for recreation.

Third, the United States notes (U.S. Brief, p. 33) that the Special Master resorted to the McDougal and Burke criterion only after concluding that "the drafters of the Geneva Convention . . . simply did not think of or consider the question of artificial piers . . . ." Report, p. 28. But the Master's statement is demonstrably incorrect, as shown by the Commission members' extensive discussion of the seven-mile pier in the Persian Gulf. *See* California Brief, pp. 24-27. Moreover, Sir Gerald Fitzmaurice of the United Kingdom in 1955 and again in 1956 made reference to "[t]he Commission's *rule* that jetties *and piers* be treated as part of the coastline . . . ."[28] (Emphasis added.) Even had there not been these express references to piers, however, the ILC's criterion unquestionably applies to the California piers: "Permanent structures erected on the coast and jutting out to sea . . . ."

But even if we assume that the question had been left open by the ILC, and that resort to the McDougal and Burke criterion were appropriate, it is plain that the six-

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[28]Summary Records of the 7th Session, [1955] 1 Y.B. Int'l L. Comm'n 73, U.N. Doc. A/CN. 4/SER. A/1955; Summary Records of the 8th Session, [1956] 1 Y.B. Int'l L. Comm'n 193, U.N. Doc. A/CN. 4/SER. A/1956.

teen piers create an "interest in the surrounding waters that would otherwise not exist . . . ." The Special Master focused on two interests only of the coastal nation, those created by harbors and those by "coastal maintenance" facilities. Report, p. 29. But the authors whose test the Master adopted did not so limit the kinds of "interest" they meant. Chapter 1 of their work deals extensively with those interests, which to abbreviate a lengthy discussion are, broadly, four: Power (e.g., defense facilities), wealth (e.g., commerce facilities), well-being, and enlightenment (e.g., ocean-research facilities). McDougal and Burke, pp. 9-10. In this light, it cannot be said that the sixteen piers do not create a "particular interest in the surrounding waters that would otherwise not exist." As we have emphasized, five of the piers were specifically found to meet the definition of a port. Report, pp. 7, fn. 7, 20-21. Producing oil wells are situated on two of the piers, the Rincon (Report, p. 20) and the Ellwood (see photographs in California Exhibit I). The national policy recognizing coastal recreation facilities as important to our nation's well-being certainly invests those piers which serve primarily recreational purposes with an interest "that would otherwise not exist."[29] The ready adaptability of the piers to changing conditions, demonstrated by the conversion of two recreational piers to ferry terminals in the wake of a massive landslide,[30] further illustrates the interests generated by these piers.

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[29]*See* California Brief, p. 37; Coastal Zone Management Act of 1972, as amended, 16 U.S.C. § 1451.

[30]California Brief, p. 11, fn. 21.

Lastly, recent events in the Middle East have recalled to our Country's awareness what is any nation's most vital interest, security. During World War II (and one may assume that similar, secret contingency plans exist today), all of the piers on the California coast were seized by our armed forces. Some were used as transfer points for vessels patrolling the Pacific coast; the others were held under guard to prevent their use by enemy vessels.[31]

We would suggest again that if this Court finds it appropriate to resort to the writings of commentators, the three State Department publications expressing the view that piers constitute parts of the coastline should be consulted. See California Brief, pp. 42-43. (A diagram from the 1965 and 1969 publications, showing a pier unconnected with a port or harbor and used for delimiting the territorial sea, is reproduced on page 51 of Californa's Petition for a Fourth Supplemental Decree.) The United States makes no comment on these publications in its Brief.

[31]Tr. Denver Hearings, pp. 303-304.

CONCLUSION

We submit that the United States has advanced no cogent reason to disqualify the sixteen piers as artificial extensions of California's coastline. The piers squarely meet the criteria of the Convention. Moreover, even employing the test recommended by the Special Master and the United States, they unquestionably create a "particular interest in the surrounding waters that would otherwise not exist . . . ." For the reasons brief herein and in our opening brief, we respectfully request that this Court enter its Supplemental Decree in the form proposed by California in its Petition for a Fourth Supplemental Decree.

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